

No. 12-2183

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., et al.

Plaintiffs-Appellants,

v.

J. NEAL INSLEY, et al.

Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of Virginia
Richmond Division

**AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER
FOR THE PROTECTION OF FREE EXPRESSION AND
THE MEDIA INSTITUTE IN SUPPORT OF APPELLANTS**

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ J. Joshua Wheeler

Date: November 27, 2012

Counsel for: Amici Curiae

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November 27, 2012
(date)

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia.

Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in federal and state courts around the country, including this Court. This appeal marks the second time in which the Thomas Jefferson Center has briefed the Court on these issues. The Center previously filed an *amicus curiae* brief when this case was before the Court on a facial challenge in 2009.

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

¹ Pursuant to Fed. R. App. P. 29, all the parties have consented to the filing of this *amici* brief. This brief was authored in whole by counsel for *amici curiae*. No party or any person other than *amici* contributed money to fund the preparation and submission of this brief.

Amici curiae are primarily interested in this case because sustaining a free press categorically requires application of the strictest level of scrutiny to regulations controlling the content or availability of newspapers. While the focus of this brief is on the critical issue of the appropriate level of scrutiny, *amici* also agree with the Appellant that the regulation at issue cannot survive strict scrutiny for the reasons set forth in Appellant’s opening brief.

ARGUMENT

I. The District Court Ought To Have Scrutinized 3 VAC § 5-20-40(A)(2) Under The More Stringent Strict Scrutiny Standard Because It Is A Content-Based Regulation That Specifically Targets Newspapers

“As a general matter, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content.” *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). Yet 3 VAC § 5-20-40(A)(2) [hereinafter “the Regulation”] does precisely that; it therefore bears the presumption of unconstitutionality. *See id.* at 591; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Moreover, the Regulation restricts speech in a context in which freedom from government interference is both assumed and cherished: newspapers. *See Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (striking down under the First Amendment a state right-of-reply statute mandating equal space in a newspaper to allow a political candidate to respond

to critical coverage).

Thomas Jefferson famously wrote, “[t]he basis of our government being the opinion of the people, the very first object should be to keep that right; were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.” Letter from Thomas Jefferson to Col. Edward Carrington (Jan. 16, 1787), *in* The Papers of Thomas Jefferson Digital Edition, (Barbara B. Oberg & J. Jefferson Looney, eds., Univ. of Va. Press, 2008) *available at* <http://rotunda.upress.virginia.edu/founders/TSJN-01-11-02-0047>. Implicit in Mr. Jefferson’s comment is the belief that government should play no role in determining the content of newspapers nor should it erect barriers to their circulation. His view became the view of the Supreme Court, which wrote in *Miami Herald*, “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.” 418 U.S. at 258.

The district court erred in assessing the constitutional validity of the Regulation because it applied the less stringent “commercial speech” analysis

even though the regulation at issue specifically targets newspapers. It ought to have scrutinized the Regulation under the much stricter standard that the Supreme Court has applied to government attempts to restrict or regulate newspaper content or circulation as in *Miami Herald* and numerous other cases. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”). Unlike the typical commercial speech case, the regulation at issue here is not focused on what the producers or sellers of a product may say about that product, but rather what *newspapers* may say about the product. It strips *The Collegiate Times* and *The Cavalier Daily* of full editorial discretion to choose which advertisements for lawful products to publish and compels them to refrain from printing certain truthful statements in the advertisements that they do publish. As such, the Regulation amounts to a state agency’s commandeering of newspaper advertising departments to advance certain interests of the state through the most constitutionally suspect manner available: eliminating disfavored speech from newspapers. The Regulation is an affront to Mr. Jefferson’s vision—and the commands of the First Amendment—that the people should receive and read newspapers composed without government interference. Regulations

specifically targeting newspapers warrant the judiciary’s highest level of sensitivity to the erosion of First Amendment rights; the level of scrutiny afforded in other contexts to mere “commercial speech” is not suited to this task.

II. The District Court Ought To Have Scrutinized 3 VAC § 5-20-40(A)(2) Under The More Stringent Strict Scrutiny Standard Because It Specifically Targets College Publications

The fact that the Regulation exclusively targets college publications makes it even more constitutionally suspect and is another reason this Court should bring to bear its strictest level of scrutiny. The Supreme Court has stated that there is no room for the view that “First Amendment protection should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Healy v. James*, 408 U.S. 169, 180 (1972); *see also Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“[U]niversities occupy a special niche in our constitutional tradition.”); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 835 (1995) (stating that “the danger . . . to speech from the chilling of individual thought and expression . . . is especially real in the University setting, where the state acts against a background and tradition of thought and experiment that is

at the center of our intellectual and philosophic tradition”); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (noting that, as “a traditional sphere of free expression,” universities play a role “fundamental to the functioning of society”).

In the context of college publications, “[a] public university may not constitutionally take adverse action against a student newspaper such as withdrawing or reducing the funding, because it disapproves of the content of the newspaper.” *Stanley v. Magrath*, 719 F.2d. 279, 282 (8th Cir. 1983); *see also Joyner v. Whiting*, 477 F.2d 456, 463–64 (4th Cir. 1973) (“The appropriate remedy for the paper's racial discrimination was [not] the permanent cessation of financial support. . . . To comply with the First Amendment, the remedy must be narrowly drawn to rectify only the discrimination in staffing and advertising.”); *Antonelli v. Hammond*, 308 F.Supp. 1329, 1337–38 (D.Mass. 1970) (“[T]he prior submission to the advisory board of material intended to be published in [the student newspaper], in order that the board may decide whether it complies with ‘responsible freedom of the press’ or is obscene, may not be constitutionally required either by means of withholding funds derived from student activity fees or otherwise.”). Both *The Collegiate Times* and *The Cavalier Daily* rely almost exclusively on advertising to fund their operating costs. *Educ. Media Co. at Virginia Tech v. Insley*, 3:06CV396 at 6, 8. *The*

Collegiate Times estimates that it loses about \$30,000 annually due to the Regulation’s content-based restriction. *Id.* at 6.

In the instant case, the state is thus attempting to do indirectly what it cannot do directly: impose a financial burden on college newspapers because of government disapproval of particular content. It is well-established that such “indirect” regulatory schemes violate the First Amendment. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . This would allow the government to ‘produce a result which [it] could not command directly’”).

The Supreme Court has stated that “the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.” *Rosenberger*, 515 U.S. at 828. Sensitive to the threat that government might wield economic regulation as a tool to suppress speech protected under the First Amendment, the Supreme Court has held that “differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.” *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). In *Leathers*, the Supreme Court made clear that “[a]bsent a compelling justification, the government may not

exercise its taxing power to single out the press . . . [because] the press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion.” *Id.* Furthermore, a tax is “suspect if it targets a small group of speakers.” *Id.* See also *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 233–34 (1987) (invalidating a tax targeting only general interest magazines and exempting other publications); *Minneapolis Star and Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 591 (1983) (holding that a tax “violate[d] the First Amendment not only because it single[d] out the press, but also because it target[ed] a small group of newspapers”); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (invalidating a tax imposed on certain newspapers).

The Regulation does both of these. Not only does it impose a financial burden on newspapers for the circulation of truthful information, it also expressly discriminates among the newspapers that must bear this financial burden. Only college publications bear the burden of limited revenue and the resulting difficulty in gaining wider circulation.

While taxes have been the tool of choice when government has attempted to impose discriminatory financial burdens on speakers, the present case demonstrates that they are not the only way that the state can restrict speech by

imposing economic burdens on certain speakers.² Indeed, in the context of the newspaper industry, which is largely sustained by advertising income and subscription fees, depriving some newspapers of access to an otherwise lawful and lucrative stream of advertising income available to its competitors can be an even greater burden than the imposition of a tax. This is what the Regulation does by depriving collegiate newspapers of revenue from a lucrative income stream enjoyed by non-collegiate publications, even those that may share the same audience.

Although the Regulation is not a tax, from the perspective of the affected college newspapers, its economic effect is no less a burden on speech than a discriminatory tax would be. *See Pitt News v. Pappert*, 379 F.3d 96, 111–12 (3rd Cir. 2004) (“The threat to the First Amendment arises from the imposition of financial burdens that may have the effect of influencing or suppressing

² Similarly, in *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), the Supreme Court held that New York’s “Son of Sam” law violated the First Amendment because it was a content-based law that “single[d] out income derived from expressive activity for a burden the State places on no other income, and [was] directed only at works with a specified content.” *Id.* at 116–17. The law mandated that any payments made to a person accused or convicted of a crime in exchange for conveying that crime through any medium of communication (including commercial mediums) were to become property of the state. *Id.* at 109. The Court concluded that the law was similar to a discriminatory tax because “both forms of financial burden operate as disincentives to speak.” *Id.* at 105.

speech, and whether those burdens take the form of taxes or some other form is unimportant.”). Accordingly, the standard of review should be no less strict than that which the Supreme Court has recognized applies to the imposition of a discriminatory tax.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court remand this case to the district court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-2183

Caption: Educational Media Co. at VA Tech v. J. Neal Insley

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

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(s) J. Joshua Wheeler

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Dated: November 27, 2012

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